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In the

Supreme Court of the United States

OCTOBER TERM 1968

No. 549

JOHN D. SENCHAL AND GRACE SENCHAL, HUSBAND AND WIFE, AND THELMA HARKREADER,

Appellants,

v.

V. H. CARROLL, TRUSTEE,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners hereby petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit denying petitioners their right to a

trial by jury on legal matters in controversy in a plenary suit arising out of bankruptcy proceedings.

OPINION BELOW

The opinion below is reported at 394 F. 2d 797. It is appended hereto as Appendix "A".

JURISDICTION

The decision sought to be reviewed was made and entered on May 23, 1968. On August 25, 1968, Mr. Justice White of this Court granted an order extending the time for filing petition for writ of certiorari up to and including September 21, 1968. The statutory provision conferring jurisdiction on this court to review the judgment in question is 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED FOR REVIEW

Whether a defendant may be denied a jury trial in action by a bankruptcy trustee to recover alleged fraudulent conveyances by the bankrupt of money and property to the defendants, and where the defendants file a counter claim against the bankrupt for breach of contract.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII, United States Constitution, "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, * * *"

STATEMENT OF THE CASE

The Respondent, on April 29, 1966 filed a complaint in the United States District Court for the Western District of

Oklahoma, seeking to set aside alleged fraudulent transfers under section 67d of the Bankruptcy Act. The complaint alleged that the fraudulent transfers consisted of certain described real estate, personal property, and an amount of money in cash alleged to be in excess of $200,000; that the transfers were made by the bankrupt, Raymond Gestes, to the named defendants, John D. Senchal, his wife, Grace Senchal, and Thelma Harkreader (Raymond Gestes was not made a party defendant). Respondent asked for a recovery of the money and a return of the property. (R. 1-6) On the same date Respondent filed motions for a preliminary injunction and for a temporary restraining order without notice. The latter motion was granted on the same date. The trial judge ordered that Respondent's motion for preliminary injunction be set for hearing on May 6, 1966. (R. 11, 12)

John D. Senchal and wife Grace filed an answer denying the allegations of the complaint and asserting that on or about July 14, 1965, Raymond Gestes, the bankrupt, had conveyed to them the described real estate and personal property for a consideration of $35,000, paid to Gestes and the assumption of an outstanding mortgage against the real estate in the principal amount of $44,100; that the property was purchased in good faith and for a fair consideration. Petitioners denied that Gestes had transferred cash in any amount to them at any time. Petitioners also filed a counterclaim alleging that Gestes at the time of the sale had agreed to construct a race track and a complete paddock

and water line to the paddock; that Gestes had only partially completed the work and the defendants were required to pay a total of $4,240.67 because of Gestes default. (R. 46-47) Thelma Harkreader filed a denial that Gestes had ever transferred to her any of the property described in the complaint or that the bankrupt had transferred to her any money in cash. A written demand for a jury trial was made. (R. 43-44)

The hearing on the preliminary injunction took place May 6 to May 11, 1966. Only the testimony of the three defendants was heard. At the conclusion of the hearing the trial judge made the following remarks:

> "Gentlemen, I want to say this, with all the evidence all in, I have no hesitancy in saying that I am absolutely convinced that this sum $250,000 drawn out of the All American Fence Company in $100 bills by Mr. Gestes over the period of say the last 9 or 10 months has gone to these sisters, and that is the money we have been talking about. They haven't saved this kind on money. *It isn't possible to expect any court to believe that they have saved this kind of money out of the income that they had, and I see this clearly as a giant swindle or an attempt to swindle the creditors of this bankrupt*, and I have no qualms about it at all in saying that this restraining order will be continued in full force and effect, and the defendant, Mrs. Senchal, is ordered to deliver forthwith, immediately to the clerk the $10,000 cash she has, and the restraining order is enlarged to prohibit the sale of these two automobiles that are in the hands of Raymond Gestes." (emphasis supplied) (R. 602, 603; also R. 93, 94).

The Trial Judge then stated that he wanted Mrs. Senchal to bring the $10,000 immediately to the court clerk. When

her trial attorney remarked that he thought that was pretty stringent the court replied:

> "Well, I do too, but this calls for stringent action; in my opinion, it calls for stringent action in this. This Mr. Crow, in my considered opinion, and I have listened carefully, is just what I said earlier — *it is a gigantic swindle or attempt to swindle, and the court has to deal severely when the circumstances call for it.* Now, just hand it to her, and let her count it now to be sure that the $10,000 that was here earlier is still here because I don't want to make her responsible for less than $10,000 * * *" (R. 606; also R. 97). (emphasis supplied)

Thereafter the Trial Court entered an order on May 18, 1966, granting the motion for preliminary injunction on the reasoning that Respondent was in danger of suffering irreparable injury, loss and damage and ordered that Petitioners be restrained from selling or otherwise disposing of the described real and personal property. The order also restrained and enjoined the Stockyard Bank of Oklahoma City from disposing or paying out any fund held by the Bank in the name of John D. Senchal or Grace Senchal or Walter Fry (R. 49, 52).

By letter dated September 2, 1966, the Trial Judge informed the attorneys of record that although it was contemplated that a jury trial would be had, the Judge was of the tentative opinion that the case would normally be tried before the court without a jury. The Judge concluded that in view of the statement of counsel he had no objection to having a jury in an advisory capacity (R. 87). By letter dated September 20, 1966, Petitioners' trial counsel informally requested the Trial Judge to disqualify himself. The Trial

Judge replied by letter dated September 22, 1966 that he had come to the conclusion that he was not disqualified as a matter of fact or as a matter of law because of his remarks made at the conclusion of the first hearing. He also stated that although he had earlier agreed to have a jury hear all the evidence and make advisory findings, since use of a jury in a merely advisory capacity was objected to by Mr. Senchal, he would hear the case without any jury at all. He stated this would "* * * save at least four days of trial time in rehashing the testimony earlier heard" (R. 91, 92). On October 14, 1966 Petitioners' motion to disqualify was filed, supported by an affidavit and certain correspondence and excerpts from the records. The motion also renewed Petitioners' request for a jury trial acting in any capacity. (R. 83) Petitioners' affidavit stated that the Trial Judge possesses and entertains a disqualifying bias and prejudice toward them as evidenced and revealed by his pronouncing judgment on the ultimate and final facts in issue at the preliminary hearing; by his failure to reserve his final judgment on the merits until hearing all of the evidence; by his expressing an opinion of record indicating a closed and inflexible mind against them without hearing their complete defense; by allowing the injection of the criminal record of Raymond H. Gestes to influence his judgment as to the credibility of Petitioners when they were not responsible for Gestes' record; by his expressed inclination to consider the case as a "penitentiary matter"; and by reversing his original decision to utilize a jury at least in an advisory capacity and dispensing with the jury altogether (R. 84, 85).

REASON FOR GRANTING WRIT

The Writ Should Be Granted Because Petitioners Were Denied Their Right To Trial By Jury on Legal Issues in the Controversy.

The Bankruptcy Act, Sec. 42 (c) provides:

> "The right to submit to a jury *matters in controversy* or an alleged offense under this act shall be determined and enjoyed, except as provided by this Act, according to the laws of the United States now in force or such as may be here enacted in relation to trials by jury." (emphasis supplied)

The Act is in line with the Seventh Amendment preserving the right to a jury trial.

Nowhere in the Bankruptcy Act is there a declaration that "matters in controversy" such as an alleged voidable preference of fraudulent conveyance should not be determined by a jury trial. This is a plenary suit involving "matters in controversy" arising out of bankruptcy proceeding." Bankruptcy proceedings are equitable in nature. The plenary suit here involved in an independent action. It comes within the definition of "matters in controversy" under Sec. 42 (c) declaring that the parties are entitled to a jury trial according to the laws of the United States.

This action brought by the trustee involves fact and law issues. Petitioners are entitled to a trial by jury on those fact and law issues.

This Honorable Court in *Schoenthal v. Irving Trust Company*, 287 U.S. 92 (1932) held that a defendant is entitled to a jury trial in a suit brought by a trustee in bankruptcy

to recover an alleged preference. There is no distinction between the right to a jury trial in suits to recover alleged preferences and those to set aside alleged fraudulent transfers. In *Schoenthal*, the trustee brought the suit in equity to recover sums of money from the defendant allegedly paid to them by the bankrupt. The trustee alleged facts that these payments operated as a preference under section 60b of the Bankruptcy Act. The trustee also asserted he had no adequate remedy at law.

In *Schoenthal* the principal question was whether the defendants were entitled to have the suit tried at law before a jury. The Court held that Section 267 of the Judicial Code serves to guard the right of trial by jury preserved by the Seventh Amendment. Section 267 should be liberally construed. In England actions of trover and money had and received were used to recover preferential payments by bankrupts. Such suits constitute no part of the *proceedings in* bankruptcy but concern controversies *arising out* of bankruptcy. (Citing *Taylor v. Voss*, 271 U.S. 176.) This is the precise situation in the case at bar. This is a suit to recover sums of money and property for which Petitioners paid sums of money. This suit is not a part of the proceedings *in* bankruptcy. It is a controversy arising *out* of the bankruptcy. Such proceedings may be brought in the state court as well as in the federal court. The defendant's right to a trial by jury in either state or federal court is clear. *Collett v. Adams*, 249 U.S. 545, 549 (1919). *Schoenthal* declared:

> "* * * and, in the absence of a clear showing that a court of law lacks capacity to give the relief which the

> allegations show plaintiff entitled to, a suit in equity cannot be maintained. * * * The contention that section 267 prohibits the maintenance of this suit in equity is sustained in principle by numerous decisions of this court. And upon the very question here presented the weight of judicial opinion in the lower federal courts and in the state courts is that suits such as this cannot be sustained in equity." (287 U.S. at p. 95)

The erroneous concept that the right to trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to equitable issues was rejected and overruled by *Dairy Queen v. Wood*, 369 U.S. 469 (1962). In *Dairy Queen* the District Court granted a motion to strike the petitioner's demand for a trial by jury on the grounds that the action was either "purely equitable" or if not purely equitable, whatever legal issues that were raised were "incidental" to equitable issues, and, in either case no right to trial by jury existed. The Court reversed the district court, stating:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury — that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to equitable issues — for our previous decisions make it plain that no such rule may be applied in the federal courts. * * *"

The Court then discussed some of the historical problems of suits involving both law and equity questions and the effect of the federal rules of civil procedure. The Court stated that the federal rules do not purport to change the basic holding of *Scott v. Neely*, 140 U.S. 106 (1891) that the right to trial by jury of legal claims must be preserved. It

was pointed out that Rule 38(a) expressly reaffirmed that constitutional principle declaring: "the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

The Court then proceeded to examine the complaint and answer in *Dairy Queen* and found a number of claims and defenses that were legal rather than equitable. One was the request for a money judgment. The court said that the claim for a money judgment "is a claim wholly legal in its nature however the complaint is construed." The money judgment claim could be construed as an action on a debt allegedly due under a contract or an action for damages based upon a charge of trademark infringement.

The respondents in *Dairy Queen* contended that their money claim was "purely equitable" because their complaint was cast in terms of "accounting" rather than in terms of an action for "debt" or "damages". (The complaint in the case at bar is framed in this manner also and the Court took $10,000 in cash from the defendants. The Trustee still has this $10,000 money judgment.) The Court disposed of this contention by stating:

> "* * * the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies is, as we pointed out in *Beacon Theatres*, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit in a cause of action cognizable at law, as this one is, the plaintiffs must be able to show that the 'accounts be-

> tween the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them. In view of the powers given to district court by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met. * * *"

The Court then stated that a jury under proper instructions could readily determine the recovery in that case. It pointed out that the legal remedy cannot be characterized as "inadequate" merely because the measure of damages may necessitate a look into petitioners' business records. This principle applies to the case at bar.

The Court also said that its ruling does not interfere with the District Court's power to grant temporary relief pending a final adjudication on the matter. So the fact that in the case at bar, the Trial Judge granted a temporary restraining order and an injunction prior to the trial on the merits, does not in any way mitigate against the defendants' right to a trial by jury.

Dairy Queen also added by way of a footnote that the decision in *Beacon Theatres* (359 U.S. 509) had settled that procedural changes which removed the inadequacies of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases.

The opinion below discusses in some detail this Honorable Courts holdings in *Dairy Queen* and *Beacon Theatres.* The opinion below agrees that these two cases are "signifi-

cant cases concerned with the right to a jury under the Seventh Amendment". But the Court below failed to apply the significant principles laid down in *Dairy Queen* and *Beacon Theatres*. The Court reverted to the old and rejected principles that if the case is "basically an equitable one" a jury trial may be denied. It gives the outmoded reason that only "equity" can afford to give relief.

Petitioners, asking for a jury trial, urged the principles of *Dairy Queen* and *Beacon Theatres* along with *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932). The opinion below does not explain why under the principles of *Dairy Queen* and *Beacon Theatres*, Petitioners are not entitled to a jury trial on the many legal issues involved in the case. The opinion gives lip service to *Dairy Queen* and *Beacon Theatres* and then distinguishes *Schoenthal* on the basis that the action in that case was for a money judgment alone.

In the case at bar there are many legal issues to be passed on by the jury such as: (1) whether the Senchals paid a fair consideration for the real estate; (2) whether Respondent is entitled to a money judgment and if so its amount; (3) whether Raymond Gestes breached the contract of sale by partial failure to build improvements; (4) whether there were fradulent transfers to Petitioners; (5) whether there was actual fraudulent intent on the part of Petitioners; (6) whether the purchase of the real estate was made with money belonging to the purchasers or to the bankrupt. Some of these legal issues have formed the basis for later criminal charges. This is an additional reason to grant Petitioners their right to a jury trial.

CONCLUSION

The judgment and opinion of the Court of Appeals deprive Petitioners of the right to trial by jury as guaranteed by the Seventh Amendment of the Constitution and codified by Sec. 42(c) of the Bankrupcy Act. For this reason this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Court Below

SETH, Circuit Judge.

The trustee for the bankrupt commenced this action to set aside transfers of money and property made by the bankrupt, and require that the property be revested in the trustee. The trial court granted judgment for the trustee, and this appeal was taken. Appellants urge two grounds for reversal; that their request for a jury trial was improperly denied, and the trial judge should have disqualified himself.

The property transferred to appellants as listed in the exhibit attached to the complaint in this plenary action included real estate, office furniture and equipment, automobiles and trucks, some twenty-five race horses, several head of cattle, and money. The money alleged in the complaint to have been transferred in cash was stated to be in excess of $200,000. The complaint prays that the conveyances be decreed to be fraudulent, that they be set aside, that the defendants be required to account for, return, and reconvey the property to the trustee, and a restraining order be issued.

The appellants counterclaimed for judgment in a stated amount or, in the alternative, that a claim against the trustee be established for such amount. The basis for the claim alleged was the bankrupt's failure to construct a paddock and other improvements on the real estate conveyed to them by the bankrupt, and sought to be revested in the trustee.

The trial court ordered the appellants to reconvey the personal and real property with all rents, profits, and increase (less expense of preserving the assets), and to turn over any receipts from the sale of any assets. The court also ordered that funds previously ordered to be paid by appellants to the clerk of the court be turned over by the clerk to the trustee, and that funds held by a bank under order of the court be transferred to the trustee.

The relief sought by the complaint is described above, and basically, the court was asked to revest the property in the bankrupt's estate. To afford the relief sought the court would have to order formal reconveyances of some of the property and delivery of other items, all of which would require affirmative action by the defendants with reference to the particular property listed. As mentioned above, no damages were sought nor money judgment prayed for. The remedy sought required and included an accounting, as the accounts were involved and lengthy. The trial lasted some nine days and several hundred accounting exhibits were introduced.

The Supreme Court in recent years has decided several significant cases concerned with the right to a jury under the Seventh Amendment. Among these are Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988, and Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44.

In *Dairy Queen* there were combined claims in equity and for a money judgment. The claim basically was for either a breach of contract or for trademark infringement. The Supreme Court there considered the rules providing for the joinder of legal and equitable actions and pointed out the provisions of Rule 38(a) of the Rules of Civil Procedure. The Court reviewed its holding in *Beacon Theatres* with respect to the trial of legal issues first to a jury when they are combined with equitable issues. The *Dairy Queen* complaint asked for an accounting covering the contract period and this would have been somewhat complicated. The Court notices that there may be cases of such nature so complicated that only a court of equity can "unravel" them but they will be most unusual. The Court held that the parties had a right "* * * to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is." See also Johnson v. Gardner, 179 F. 2d 114 (9th Cir.).

The earlier case of *Beacon Theatres* concerned contracts to show exclusively first-run motion pictures, and protec-

tion from others showing the same films until a certain time had elapsed. The complaint also alleged a controversy under the antitrust act. The trial court found the portions of the complaint seeking declaratory relief were equitable, but the Supreme Court held that the right to a jury in the treble damage aspect would prevail over all. The Court thus held that the equitable issues and defenses could be properly handled, but that the legal issues should be tried first. The Supreme Court in *Dairy Queen* said, "*Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." See also Simler v. Conner, 372 U.S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691, where the issue was the amount of attorney fees to which petitioner was entitled under a contingent fee retainer contract.

[1] In the case at bar the action is basically an equitable one calling for relief which only equity can afford. It is not a part of the bankruptcy proceedings, but is an independent equitable proceeding seeking to revest property in the bankrupt's estate. We hold that under the authorities discussed above the trial court was correct in refusing appellants' request for a jury.

The appellants urge that the case of Schoenthal v. Irving Trust Co., 287 U.S. 92, 53 S. Ct. 50, 77 L. Ed. 185, requires that a jury trial be held; however, the complaint there sought only to recover $500 from one defendant and $1000 from another. The action was thus for a money judgment alone in the stated amounts although the basis for recovery was an asserted preference under the Bankruptcy Act. The Supreme Court there held that a jury was required. The Court said, "The facts here alleged give no support to plaintiff's assertion that it has no adequate remedy at law. The preferences sued for were money payments of ascertained and definite amounts. The bill discloses no facts that call for an accounting or other equitable relief." We do not consider that the cited case leads to a conclusion contrary to that stated above, nor did the counterclaim change the nature of the action.

The appellants sought to disqualify the trial judge because statements he made at the hearing for the temporary restraining order indicated that he had then made up his mind on the merits of the case. The record shows that the trial judge at the hearing said that he saw the transfers by the bankrupt as an attempt to "swindle" the creditors.[1]

[2] It is apparent that the trial judge had to take a position at the hearing for a temporary restraining order in this case where fraudulent transfers were asserted and where the unusual nature of the property indicated some method to retain the status quo. It was incumbent upon the appellants to then make a strong showing on at least the irreparable damage aspect in order to obtain the restraining order. They also had to make some showing of a likelihood that they would prevail on the merits. The preliminary hearing took some four days of trial and many exhibits were introduced. The trial judge used strong language in his statements at the conclusion of the hearing, but it was necessary that he be convinced before a restraining order could issue. We do not consider that his statements of his views at that time necessarily disqualify him from proceeding with the trial. These circumstances do not bring this case within Frito-Lay, Inc. v. Morton Foods, Inc., 316 F. 2d 298 (10th Cir.). The trial judge was not disqualified and had a duty to proceed.

Affirmed.

---

[1] At the conclusion of the hearing on the temporary injunction the trial court said:

"THE COURT: Gentlemen, I want to say this, with all the evidence all in, I have no hesitancy in saying that I am absolutely convinced that this some $250,000 drawn out of the All American Fence Company in hundred dollar bills by Mr. Gestes over the period of say the last nine or ten months has gone to these sisters, and that is the money we have been talking about. They haven't saved this kind of money. It isn't possible to expect any court to believe that they had saved this kind of money out of the income that they have had, and I see this clearly as a giant swindle or an attempt to swindle the creditors of this bankrupt, and I have no qualms about it at all in saying that this restraining order will be continued in full force and effect, * * *."

This was followed by a discussion whether the race horses should be entered in claiming races or not.

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Respondent.

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October, 1968

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SUBJECT INDEX

	PAGE
Statement of the Case	1
Reason for Denying Writ	6
An action by a trustee in bankruptcy to set aside a fraudulent conveyance has long been cognizable in equity and hence the Seventh Amendment to the United States Constitution is inapplicable to such a claim as is Section 42(c) of the Bankruptcy Act	6
Conclusion	14

AUTHORITIES

CASES:

Barnard v. Coen, 9th Cir. 1923, 8 F.2d 13	7
Beacon Theatres, Inc. v. Westover, 359 U.S. 509, 79 S.Ct. 948	10
Benedict v. Seiberling, 17 F.2d 831	13
Clifton Park Manor, Sec. 1 v. Mason, 137 F.Supp. 324 (1955)	12
Dairyqueen Inc. v. Woods, 169 U.S. 469 (1962)	10
Dansky v. Zavatt, 289 F.2d 46 (1961)	6
Hobbs v. Hull, 1 Cox Ch. 445, 29 E.R. 1242 (1788)	6
Hummel v. Wells Petroleum, 7 C.C.A., 111 F.2d 883 (1940)	8
Johnson v. American Hawaiian SS Co., 9 C.C.A., 98 F.2d 847 (1938)	8
Johnson v. Gardner, 9 Cir., 1949, 179 F.2d 114, cert. den. 1950, 339 U.S. 935, 70 S.Ct. 661, 94 L.Ed. 1353	6-7, 7-8
Kemp Booth Co. v. Calvin, 9th C.C.A. 1936, 84 F.2d 377	7

INDEX CONTINUED

	PAGE
Rader v. Boyd, C.C.A. 10, 252 F.2d 585 (1958)	11
Ring v. Spina, et al., 2 C.C.A., 166 F.2d 547 (1948)	8
Schoenthal v. Irving Trust Co., 278 U.S. 192, 53 S.Ct. 50 (1938)	8
Upstein v. U. S., 196 Fed. 354, cert. den. 223 U.S. 731	13
W. A. Mack, Inc. v. General Motors Corporation, 260 F.2d 886 (1958)	12
Williams v. Collier, D.C. Pa. 1940, 32 F.Supp. 321	8-10
5 Moore, Fed. Practice, 2nd Ed. (1951), p. 176	7

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully urge that the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit filed herein, be denied.

STATEMENT OF THE CASE

This action was initiated by the respondent, V. H. Carroll, Trustee of the Estate of Raymond H. Gestes, Bankrupt, hereinafter referred to as plaintiff, against the defendants, John D. Senchal and Grace Senchal, husband and wife, and Thelma Harkreader, petitioner, hereinafter re-

ferred to as defendants, praying an order of the court directing that certain specific property be turned over to the plaintiff by the defendants and that they be required to account for rents, and profits derived therefrom while the same was under their custody and control. *No money judgment or damages were sought.*

The statement contained in the petition, while for the greater part correct, is both incomplete and inaccurate in certain aspects as hereinafter set out.

This action arose as a result of an involuntary bankruptcy petition filed against Raymond Henry Gestes in January of 1966 and his subsequent adjudication in bankruptcy. The alleged bankrupt filed a confession of bankruptcy and was adjudicated a bankrupt and the case referred to the Honorable William T. Billups, Referee in Bankruptcy for the United States District Court for the Western District of Oklahoma.

After filing of the bankruptcy schedules, and lengthy hearings before the Referee in Bankruptcy, it developed that within one year prior to bankruptcy, the bankrupt had transferred to the defendants, Grace Senchal, a sister, and John D. Senchal, a brother-in-law, and Thelma Harkreader, a sister of the bankrupt, certain property, real and personal. An application for turn over order was filed before Judge Billups and an order to show cause directed to the defendants in this action issued. At a subsequent hearing, Judge Billups denied summary jurisdiction of the court, continued a temporary injunction in full force and effect and directed that plenary proceedings be filed by the trustee to recover this property. Pursuant to this instruction, the instant action was filed.

The application for preliminary injunction was heard before the Honorable Luther Eubanks, Judge of the United States Court for the Western District of Oklahoma, on May 6 through May 11, 1966.

Contrary to the statement in the petition, that only the testimony of the defendants was considered at this hearing, there was offered for the court's consideration the testimony of some eleven witnesses and in excess of 113 plaintiff's exhibits were introduced in evidence in four full days of trial.

Exhibits considered by the court included all banking records of the bankrupt; banking records of the defendant Senchal including canceled checks and banks' statements covering a period in excess of ten (10) years; deeds, mortgages, bills of sale of property both real and personal; and federal and state tax returns filed by the defendant Senchal from 1949 through 1964.

Typical of the transactions between the bankrupt and the defendants is the following example:

> "June 29, 1965, bankrupt withdraws $35,000 from his bank account at the Oklahoma National Bank in the form of cashier's checks (Supp. R. 10) and within three (3) days following, converted the same into cash in the form of $100 bills (Supp. R. 25) (R. 546-541);
>
> "July 12, 1965, John and Grace Senchal deposit $35,000 in $100 bills in their bank account at the Capitol Hill State Bank and Trust Company (Supp. R. 50);
>
> "July 14, 1965, John Senchal writes a check to the bankrupt for $35,000 purporting to be payment for the

bankrupt's equity in a farm in Payne County, horses and implements of husbandry, as well as all improvements, which property comprises the bulk of the assets sought to be recovered in this action by the trustee (Supp. R. 51)."

The bankruptcy schedules filed by the bankrupt indicated transfers of property within one year next preceding bankruptcy in excess of $109,000 and debts as of the date of bankruptcy in excess of $550,000, for a total depletion of his estate in excess of $659,000 within one year next preceding the filing of the petition in bankruptcy.

No tangible assets were scheduled.

The bankrupt sought to explain these losses by his unconfirmed statement that "he gambled away every penny he had" (R. 538, 598, 601, 721, 1037, 1038).

The only explanation offered by defendant Grace Senchal for her sudden affluence was her unconfirmed statement that she had amassed an excess of $80,000, in cash, in $100 bills, over a period of years from unconfirmed gifts from persons deceased and savings out of her grocery money.

John Senchal admitted that he had not knowingly contributed any funds towards these savings or, in fact, knew of their existence until July of 1965.

Defendant Thelma Harkreader likewise explained her wealth as having been acquired from unconfirmed gifts from men friends and former husbands, totaling in excess of $160,000 in cash, in $100 bills.

Willis Harkreader, the husband of the defendant Thelma Harkreader, testified that he had not contributed

to these savings or knew of their existence (Supp. R. 117, 118, 119).

At the time of trial, some five former husbands in addition to the testimony of Mr. Harkreader, her present husband, testified that they had not contributed to these savings or believed Thelma Harkreader to have amassed this amount of money (R. 633, 642, 657, 666, 836).

Both defendants Thelma Harkreader and Grace Senchal admitted that none of these funds had ever been banked, declared as income for tax purposes, or declared as cash savings for purposes of personal properties tax, although they admitted sworn returns had been filed.

John Senchal admitted that the funds on deposit with the Stockyards Bank were derived through the sale of race horses and winnings at various tracks during the period July of 1956 to January of 1966 (R. 265 through 270). He further testified that he withdrew funds upon it being indicated that the Referee in Bankruptcy would issue an injunction enjoining their disposition (R. 270).

Mr. Senchal admitted that the $10,000 exhibited at the time of the preliminary hearing were funds withdrawn from the Stockyards Bank and derived from the sale of horses and track profits (R. 269, 446, 447, 448).

The bankrupt admitted insolvency prior to the transfer and his accountant testified he, the bankrupt, had instructed her "to pay no one as early" as May 1965 and two months prior to the transactions here involved (Supp. R. 61, 62).

The trial court entered an order on May 18, 1966, granting a motion for preliminary injunction and ordering

the funds exhibited by Mrs. Senchal impounded by the clerk and further enjoined disposition of two automobiles then in possession of the bankrupt, Raymond Gestes, but titled in the name of one of the defendants, Thelma Harkreader, which titles had been endorsed in blank by Thelma Harkreader (R. 2168, 2169).

The first indication of dissatisfaction with Judge Eubanks came in the form of a letter from the defendant Thelma Harkreader to her then attorney, V. P. Crowe, with a copy to Judge Eubanks. Mr. Crowe withdrew from the case and it was not until plaintiff had the case set for pre-trial that new counsel was employed.

At the initial and subsequent pre-trial conferences, the court considered the defendants' request for jury trial and request that he disqualify, subsequently denying jury trial and stating that he did not feel himself disqualified, but on the contrary, felt obligated not to disqualify himself.

REASON FOR DENYING WRIT

An action by a trustee in bankruptcy to set aside a fraudulent conveyance has long been cognizable in equity and hence the Seventh Amendment to the United States Constitution is inapplicable to such a claim as is Section 42(c) of the Bankruptcy Act.

For want of better language, the reason above stated is taken for the greater part directly from language used by the Court in *Dansky* v. *Zavatt*, 289 F.2d 46 (1961) citing *Hobbs* v. *Hull*, 1 Cox Ch. 445, 29 E.R. 1242 (1788); *Johnson* v. *Gardner*, 9 Cir., 1949, 179 F.2d 114, *certiorari denied* in 1950, 339 U.S. 935, 70 S.Ct. 661, 94 Lawyers

Edition 1353; 5 Moore, *Fed. Practice,* 2nd Edition (1951), p. 176.

As in the case at bar, the *Johnson* v. *Gardner* case involved an action brought by a trustee in bankruptcy in a plenary suit to avoid certain transfers of property alleged to have been made to relatives of the bankrupt without consideration and with intent to hinder, delay and defraud the creditors of the bankrupt. We respectfully submit that this case is on all fours with the present action and that the only distinguishing factor is that in the *Johnson* case money judgment was asked in addition to the avoidance of the transfers, while in the instant action, no money judgment was asked or granted.

In affirming the trial court's denial of jury, the Court stated in *Johnson* v. *Gardner, supra:*

> "It is pellucidly clear from a consideration of the pleadings, finding, conclusions and judgment in the record before us that the action of the district court was entirely and essentially one of equitable cognizance."

In affirming the trial court's denial of jury trial, the Court in the *Johnson* case cited *Barnard* v. *Coen,* 9th Cir. 1923, 8 F.2d 13, and *Kemp Booth Co.* v. *Calvin,* 9th C.C.A. 1936, 84 F.2d 377, and stated at page 117 of 179 F.2d:

> "There was no demand for monetary relief except such as might be awarded against the bankrupt as corollary to an accounting which is in an historic field of equity jurisprudence.
>
> "The gravamen of the suit and the crucial issue in it is the fraud that is alleged in the amended complaint to be the actuating means of the conveyances of real

property which the trustee seeks to recover for the bankrupt estate. Thus the wrong wrought by the fraud is not remediable at law in any efficient and practical way, and the historical equitable relief by cancellation of record is the only adequate and complete remedy.

> "Under such a situation, while it is true that the fraud alleged in the amended complaint is a question of fact in the suit, it is not one which under the record the chancellor was required to call the jury to decide." [Citing *Hummel* v. *Wells Petroleum*, 7 C.C.A., 111 F.2d 883 (1940); *Johnson* v. *American Hawaiian SS Co.*, 9 C.C.A., 98 F.2d 847 (1938).]

The Court in *Johnson* v. *Gardner, supra*, also dealt with the application of Sec. 19C of the Bankruptcy Act to facts similar to those in the case at bar stating:

> "Primarily, it is to be noted that the statutory provisions respecting the absolute right to jury trial in involuntary proceedings in bankruptcy in Section 19 of the Bankruptcy Act, Title 11 USCA, Sec. 42, have no application in this matter."

The right to a jury in the domain or field of equity such as is here involved is determinable by the issues of fact that are pleaded in the suit and the type and quality of remedies that are applicable and available to the suiter. This has been the yardstick which has been applied under both the ancient divisions of law and equity and the single action in the unified procedures under the federal rules. *Ring* v. *Spina, et al.*, 2 C.C.A., 166 F.2d 547 (1948); *Schoenthal* v. *Irving Trust Co.*, 278 U.S. 192, 53 S.Ct. 50 (1938); *Williams* v. *Collier*, D.C. Pa. 1940, 32 F.Supp. 321.

In *Williams* v. *Collier, supra*, a trustee sought to avoid a fraudulent transfer of assets and accounting and judg-

ment for the fair market value of the assets involved. The Court read into the case a prayer for an accounting and stated:

> "Where, in addition to seeking a money judgment, the bill of the trustee alleged facts calling for additional relief of an equitable nature, the two decisions appear to be in agreement that the case properly was before a court of equity."

We respectfully invite the Court's attention to the fact that in the instant case no money judgment was sought nor was one granted. The Court in *Williams* v. *Collier,* dealt with a question of mixed equitable and legal action and held that where money judgment was incidental to an equitable action for an accounting and avoidance of fraudulent transfer, the matter was one in equity. In the instant case, no such problem exists and it would thus seem clear that the defendants were not entitled to a jury.

With regard to a request for an accounting, for rents or profits derived by the defendants from property fraudulently transferred to them, the Court in *Williams* v. *Collier* set out:

> "A common instance of an accounting of a strictly equitable nature is that sought by cestui que trust from a trustee; and this is so in connection with constructive trusts (citing cases). In *Buffum* v. *Barceloux Co.,* Justice Cardozo applied the doctrine to the case of a fraudulent transferee of shares who had reconveyed to another. The Court declared . . . that the fraudulent grantee could be held as a trustee maleficio for the value of the shares and reiterated the rule that 'the trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value.' In the instant case, plaintiff also seeks an

> accounting from the allegedly fraudulent transferee and demands expressly that Bertha Collier be declared a trustee maleficio. It would appear, therefore, that plaintiff's remedy in this respect is one formerly cognizable in equity."

The Court further observed that such being the case, they need not pass upon whether or not the transactions alleged were complex as to render a jury trial impractical.

It is thus necessary in order to determine the validity of defendants' demand for jury trial to examine and consider the nature of the relief requested in plaintiff's complaints, the facts alleged and the relief granted.

An examination of the pleadings, findings of fact, conclusions of law, and judgment in this case, readily reveals that this action was not based upon breach of contract, nor did it seek money damages as was the issue in *Dairyqueen Inc.* v. *Woods,* 169 U.S. 469 (1962), nor is it sought to enjoin the filing of an action by the defendant, which had the defendant filed it, would have been purely legal as in the *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 509, 79 S.Ct. 948.

The Court, in the *Dairyqueen* case, *supra,* recognized the proposition that in certain instances of a complex nature equity might take jurisdiction over a matter couched in law stating:

> "The necessary prerequisite to the right to maintain suit for equitable accounting is the absence of an adequate remedy at law and in order to maintain such a suit on a cause of action cognizable as one at law, plaintiff must be able to show that accounts between the parties are of such a complicated nature that only a court of equity could satisfactorily unravel it."

It is respectfully submitted that the instant case required nine full days of trial by the court and consideration of numerous witnesses and in excess of 400 exhibits, many of which were many pages in length and covered a period of many years. It is thus apparent that the transactions between the defendants and the bankrupt were of an extremely complicated nature and required the consideration of a trained and perceptive mind.

Certainly it cannot be said in the instant action that the appellants were deprived of their right to jury trial on their cross-complaint, for, in fact, no right to a jury on their claim existed. That the filing, proof, and allowance or rejection of claims against the bankrupt is a matter of purely equitable jurisdiction has many times been recognized by our Courts. In *Rader* v. *Boyd*, C.C.A. 10, 252 F.2d 585 (1958), Chief Judge Murrah stated:

> "A court of bankruptcy is a court of equity, exercising equitable powers of broad sweep, and, within the statutory scheme, the court may exert such powers in full vigor with respect to allowance, rejection or subordination of claims. It is empowered to shift the circumstances surrounding any claim to see that injustice and unfairness is not done in the administration of a bankrupt estate."

It is therefore urged that in the instant action the suit was based solely and exclusively on a prayer for relief of an equitable nature in that plaintiff, appellee, sought only to have restored to the bankrupt estate that which had been wrongfully transferred by the bankrupt within one year next preceding the filing of the bankruptcy, and for an accounting by the defendants, for the rents, profits and gain while the property was in their possession.

It is further respectfully submitted that no dissatisfaction was found with Judge Eubanks or expressed by any of the defendants until approximately one month following his decision on plaintiff's application for preliminary injunction. On June 9, 1966, a letter was written to Mr. V. P. Crowe, the then attorney for the defendants in this action, with a copy sent to Judge Eubanks, part of which we quote:

> "You see, Mr. Crowe, what you shyster lawyers and unscrupulous Federal Judges failed to realize is, in this modern day, some of us average citizens, who know what this country is all about, can spot a fix in a court room as surely as a dog can smell a coward."

The burden which must be sustained by a party seeking a preliminary injunction is indeed a heavy one as has been many times recognized. In *Clifton Park Manor, Sec. 1* v. *Mason*, 137 F.Supp. 324 (1955), Court stated:

> "A party who seeks a preliminary injunction must not only allege facts as to which there is not serious dispute but must also indicate facts showing that he has reasonable probability of success upon final hearing."

Further, the Court in *W. A. Mack, Inc.* v. *General Motors Corporation*, 260 F.2d 886 (1958), stated:

> "A preliminary injunction should not issue unless complaint can be construed to make out a prima facie case."

It was thus necessary before Judge Eubanks could grant plaintiff's application for a preliminary injunction to ascertain that the complaint was sufficient, that plaintiff

was likely to suffer irreparable damage if the injunction did not issue, and that there was reasonable probability that the petitioner would prevail at the time of trial.

Contrary to statements in the petition the court considered testimony of numerous witnesses and well over 100 exhibits in reaching an affirmative conclusion with regard to the guide lines set out above. This hearing took four and one-half days of trial before the court.

In *Benedict* v. *Seiberling*, 17 F.2d 831, the Court held:

> "Adverse judicial action cannot be made the basis for disqualification unless facts and reasons are alleged which show that the judge was biased or prejudiced."

See also *Upstein* v. *U. S.*, 196 Fed. 354, *certiorari denied* 223 U.S. 731.

We therefore urge that while the language used by the judge was strong in stating his opinion and decision on application for preliminary injunction, he was not, as a result of the expression of his opinion, disqualified from hearing the case at the actual trial. His words did not reflect prejudice, but rather the strength of his convictions.

Perhaps the best insight into the judge's feelings and convictions can be found in his own words. In a letter to Mr. Jack E. Wilson, the attorney hired to represent the defendants after Mr. Crowe had been discharged, Judge Eubanks set out his position most clearly. We quote from the second grammatical paragraph of that letter:

> "I have made a complete search of my soul and conscience many times in connection with this matter and have invariably reached the same answer which is

that I am not disqualified in this case as a matter of fact. I further believe that I am not disqualified as a matter of law by reason of the remarks I made at the conclusion of the first hearing in the case. I believe that my findings and orders were fully justified and supported by the evidence at that hearing and say quite frankly that absent new and additional evidence upon further hearing my opinion would remain the same, however you may be assured that any final decision I make in this or any other case will be based upon all the facts then before me. I have found no difficulty in changing my mind when later facts show I was initially wrong."

It is urged that Judge Eubanks' actions, in the face of complexity and threat, were motivated solely by logic and discretion, in keeping with the finest traditions of the Federal Judiciary.

CONCLUSION

By reason of the foregoing, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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